AKB Airconditioning & Electrical Sdn Bhd v Hew Foo Onn & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S5-24-1919 OF 2001
ABDUL MALIK ISHAK J
4 FEBRUARY 2002

Civil Procedure — *Declaration — Application for — Issued at discretion of court — Whether court should allow declaration sought — Whether person seeking declaration had a real interest*

Land Law — *Restraint on dealings — Caveats — Application to remove caveat — Plaintiff successful bidder of property — Defendants lodged private caveat on property — Whether plaintiff an 'aggrieved person' — National Land Code 1965 s 327*

Land Law — *Restraint on dealings — Caveats — Caveatable interest — Whether duty of registrar to enquire into whether application for entry of private caveat validly made — National Land Code 1965 s 323*

Legal Profession — *Duty to client — Obligations of counsel — Defendant did not file affidavit in reply — Counsel for defendant left plaintiff's application to court's discretion — Counsel must assist court by being candour courteous and fair — Whether defendant's counsel should have left plaintiff's application to court's discretion*

The plaintiff successfully bid for a double-storey semi-detached house ('the property') at a public auction on 23 April 2001. Unbeknown to the plaintiff, the defendants had lodged a private caveat on the title of the property on 21 November 2000. The plaintiff filed an originating summons ('OS') seeking, inter alia, for the removal of the private caveat. On the date of the hearing of the OS, counsel for the plaintiff informed the court that the defendants had not filed any affidavit in reply to the plaintiff's supporting affidavit. In view of the lack of any affidavit in reply, counsel for the defendants stated that he would leave the OS to the discretion of the court. The court accordingly gave an order in terms of the OS. The defendants had since lodged an appeal against the order granted by the court.

Held:

(1) Since the judge had the legal duty to write his judgment, as a corollary thereto, the counsel having conduct of the case must assist the judge by preparing his case and submitting on both the facts and the law. Here, counsel for the defendants took the easy way out by leaving the fate of the OS to the discretion of this court (see p 400B–C).

(2) As an advocate and solicitor, the counsel who appeared before the court must assist the court by being 'candour, courteous and fair' and to do so, learned counsel for the defendants should not have left the fate of the OS to the discretion of this court (see p 401E–F).

(3) Pursuant to s 323 of the National Land Code 1965 ('the NLC'), only a person having a caveatable interest may enter a private caveat. It was essential that the caveator claimed title to the land or any registrable interest in the land or any right to such title or interest to the land and it was not the duty of the registrar to enquire into whether the application for the entry of the private caveat was validly made. Upon sight of the duly executed Form 19B of the NLC, the registrar had no discretion but to enter the private caveat applied for. It was the domain of the High Court to exercise its judicial function to adjudicate on the validity of the entry of the private caveat (see pp 401H–402B).

(4) Under s 327 of the NLC, any aggrieved person may apply to the High Court for an order to remove the private caveat. The term 'aggrieved person' was wide enough to cover and encompass any person whose interest in the land was adversely affected by the existence of the private caveat. In the instant case, the plaintiff was the successful bidder of the property and was 'aggrieved' by the entry of the private caveat by the defendants. Accordingly, the plaintiff was an 'aggrieved person' and its interest to the title of the property made it a fit candidate to apply to this court to remove the private caveat filed by the defendants (see p 403C–E).

(5) When this court granted order in terms of the OS and ordered the private caveat to be removed, the defendants appeared to be satisfied with the court's decision because there was no oral application for a stay. By the defendants' conduct, they appeared not to be concerned as to whether the private caveat should remain on the register document of title or otherwise. Hence, the defendants should be estopped from challenging the court's decision (see pp 403G–404A).

(6) A declaration declared the legal rights of the parties and a declaratory order had no coercive force but was a private law remedy available to any citizen. A declaration was useful because the public authority on whom that declaration was directed at would not disobey the declaration made by the court. Section 41 of the Specific Relief Act 1950 gave the plaintiff the right to seek a declaration as regards the plaintiff's entitlement to a 'legal character' or to any 'right to property'. On the other hand, under O 15 r 16 of the RHC, all the plaintiff needed to do would be to show that his legal interests were peculiarly affected (see p 404B–F).

(7) It was entirely discretionary on the part of the court whether to allow the declaration that was being sought. Being a discretionary remedy, the court had the inherent power to refuse relief to speculators, busybodies, those who asked hypothetical questions and those who did not have sufficient interest. The person seeking the declaration must have a real interest to raise it and the plaintiff in the instant case fitted the bill perfectly. Accordingly, the

plaintiff was entitled to seek the declaration sought for in the OS (see p 405D–E).

[Bahasa Malaysia summary

Plaintif berjaya dalam tawaran untuk sebuah rumah berbandung dua tingkat ('hartanah tersebut') di suatu lelongan awam pada 23 April 2001. Tanpa diketahui oleh plaintif, defendan-defendan telah memasukkan satu kaveat persendirian ke atas hakmilik tanah tersebut pada 21 November 2000. Plaintif telah memfailkan satu saman pemula ('SP') memohon, antara lain, untuk pembatalan kaveat persendirian tersebut. Pada tarikh perbicaraan SP tersebut, peguam plaintif telah memaklumkan kepada mahkamah bahawa defendan-defendan belum memfailkan sebarang afidavit jawapan kepada afidavit sokongan plaintif. Memandangkan ketiadaan sebarang afidavit jawapan, peguam bagi pihak defendan-defendan menyatakan bahawa beliau akan membiarkan SP tersebut untuk ditentukan menurut budi bicara mahkamah. Mahkamah, sehubungan itu, telah memberikan satu perintah seperti yang dipohon oleh SP tersebut. Sejak itu, defendan-defendan telah membuat rayuan terhadap perintah yang diberikan oleh mahkamah.

Diputuskan:

(1) Oleh kerana hakim mempunyai kewajipan undang-undang untuk menulis penghakimannya, sebagai natijahnya, peguam yang mengendalikan kes tersebut mestilah membantu hakim dengan menyediakan kes beliau dan berhujah atas fakta-fakta dan undang-undang. Di sini, peguam bagi pihak defendan-defendan telah mencari jalan keluar yang mudah dengan membiarkan SP tersebut ditentukan menurut budi bicara mahkamah ini (lihat ms 400B–C).

(2) Sebagai peguambela dan peguamcara, peguam yang hadir di hadapan mahkamah semestinya membantu mahkamah dengan bertindak 'candour, couteous and fair' dan untuk melakukan sedemikian, peguam bijaksana bagi pihak defendan-defendan sepatutnya tidak membiarkan nasib SP tersebut kepada budi bicara mahkamah ini (lihat ms 401E–F).

(3) Selaras dengan s 323 Kanun Tanah Negara 1965 ('KTN'), hanya seseorang yang mempunyai kepentingan yang boleh dikaveatkan boleh memasukkan satu kaveat persendirian. Adalah penting bahawa pengkaveat telah menuntut hakmilik kepada tanah tersebut atau sebarang kepentingan yang boleh didaftarkan di dalam tanah tersebut atau sebarang hak kepada hakmilik yang sedemikian atau kepentingan kepada tanah tersebut dan ia bukan merupakan tugas pendaftar untuk menanyakan sama ada permohonan untuk kemasukan kaveat persendirian telah dibuat secara sah. Setelah melihat Borang 19B KTN yang telah

disempurnakan, pendaftar tidak mempunyai budi bicara melainkan memasukkan kaveat persendirian yang dipohon itu. Ia adalah di dalam lingkungan Mahkamah Tinggi untuk melaksanakan fungsi kehakimannya untuk menghakimkan atas keesahan kemasukan kaveat persendirian tersebut (lihat ms 401H–402B). A

(4) Di bawah s 327 KTN, mana-mana orang yang terkilan boleh memohon kepada Mahkamah Tinggi untuk mendapatkan perintah untuk membatalkan kaveat persendirian tersebut. Ungkapan 'aggrieved person' cukup luas untuk meliputi dan merangkumi mana-mana orang yang kepentingannya di dalam tanah tersebut telah terjejas secara bertentangan oleh kewujudan kaveat persendirian. Dalam kes ini, plaintif adalah penawar yang berjaya dalam penawaran bagi hartanah tersebut dan telah 'aggrieved' oleh kemasukan kaveat persendirian oleh defendan-defendan. Sehubungan itu, plaintif merupakan 'aggrieved person' dan kepentingannya dalam hakmilik hartanah tersebut menjadikannya calon yang sesuai untuk memohon kepada mahkamah ini untuk membatalkan kaveat persendirian yang telah difailkan oleh defendan-defendan (lihat ms 403C–E). B C D

(5) Ketika mahkamah ini memberikan perintah seperti dipohon dalam SP tersebut dan memerintah supaya kaveat persendirian tersebut dibatalkan, defendan-defendan nampaknya berpuas hati dengan keputusan mahkamah kerana tidak terdapat permohonan lisan untuk satu penangguhan. Melalui tindakan defendan-defendan itu, mereka nampaknya tidak mengambil berat sama ada kaveat persendirian tersebut seharusnya kekal pada daftar dokumen hakmilik atau sebaliknya. Oleh itu, defendan-defendan haruslah diestop daripada mencabar keputusan mahkamah (lihat ms 403G–404A). E F

(6) Sesuatu pengisytiharan mengisytiharkan hak undang-undang pihak-pihak tersebut dan sesuatu perintah pengisytiharan tidak mempunyai kuasa yang bersifat paksaan tetapi adalah satu remedi undang-undang persendirian yang tersedia ada kepada mana-mana warganegara. Sesuatu pengisytiaharan adalah berguna kerana pihak berkuasa awam ke atas siapa pengisytiharan itu ditujukan tidak akan mengingkari pengisytiharan yang dibuat oleh mahkamah tersebut. Seksyen 41 Akta Relif Spesifik 1950 memberikan plaintif hak untuk mendapatkan satu pengisytiharan berhubung dengan keberhakan plaintif kepada satu 'legal character' atau kepada sebarang 'right to property'. Sebaliknya, di bawah A 15 k 16 KMT, apa yang plaintif perlu lakukan adalah untuk menunjukkan bahawa kepentingan undang-undang beliau telah terjejas dengan aneh (lihat ms 404B–F). G H

(7) Adalah mengikut budi bicara mahkamah sama ada untuk membenar pengisytiharan yang dipohon. Sebagai remedi budi bicara, mahkamah mempunyai kuasa sedia ada untuk menolak I

relief kepada pihak-pihak yang membuat spekulasi, orang yang suka mengambil tahu akan hal orang lain, mereka yang menanyakan soalan-soalan hipotesis dan mereka yang tidak mempunyai kepentingan yang mencukupi. Orang yang memohon pengisytiharan mesti mempunyai kepentingan sebenarnya untuk membangkitkannya dan plaintif dalam kes ini sesuai dengan keadaan itu. Sehubungan itu, plaintif berhak mendapatkan pengisytiharan yang dipohon dalam SP tersebut (lihat ms 405D–E).]

Notes

For cases on private caveats generally, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3316–3317.

For cases on duty to client generally, see 9 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1445–1450.

Cases referred to

B, Re, An Infant [1958] 1 QB 12 (refd)

Barnato, Re, Deed, Joel v Sanges [1949] Ch 258 (refd)

Balasingham v PP [1959] MLJ 193 (refd)

Chaffers v Goldsmid [1894] 1 QB 186 (refd)

Chi Liung & Son Sdn Bhd v Chong Fah & Sons Sdn Bhd & Anor [1974] 2 MLJ 211 (refd)

Chiew Sze Sun v Muthiah Chettiar [1983] 1 MLJ 390 (refd)

Chong Fye Lee & Toong Hing Loong Tin Mining Co Ltd, Re Applications of [1965] MLJ 29 (refd)

Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors [1996] 2 MLJ 206 (refd)

Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed bin Syed Idrus [1981] 1 MLJ 29 (refd)

Dawkins v Prince Edward of Saxe Weimar, Dawkins v Wynyard, Dawkins v Stephenson (1875–1879) 1 QBD 499 (refd)

Hambrougits Estate, Re; Hambrough v Hambrough (1909) 2 Ch 620 (refd)

Hanson v Radcliffe Urban District Council [1922] 2 Ch 490 (refd)

Harrison v Croydon London Borough Council [1968] Ch 479 (refd)

Haji Yahya bin Yusoff & Anor v Hassan bin Othman & Anor [1978] 2 MLJ 153 (refd)

Ho Shee Chit & Anor v Bruusgaard Kisteruds Skibsaksjeselskap & Anor [1982] 2 MLJ 35 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481 (refd)

Ikebife Ibeneweka & Ors v Peter Egbuna & Anor [1964] 1 WLR 219 (refd)

Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 (refd)

Jit Kaur v Parl Singh [1974] 2 MLJ 199 (refd)

K Sockalingam Mudaliar v MRM Ramasamy Chettiar; A Veeramal [1938] 7 MLJ 237 (refd)
Lim Cho Hock v Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85 (refd)
Macon Engineers Sdn Bhd v Goh Hooi Yin [1976] 2 MLJ 53 (refd)
Margaret Chua v Ho Swee Kiew & Ors [1961] MLJ 173 (refd)
Millwall, The [1905] P 155 (refd)
Mohamad Salleh v Lau Siok Kee [1974] 1 MLJ 102 (refd)
Mohamed Ashraff & Anor v The Commissioner for Federal Capital, Kuala Lumpur & Anor [1972] 2 MLJ 69 (refd)
N Vangedaselam v Mahadevan & Anor [1976] 2 MLJ 161 (refd)
Ong Chat Pang & Anor v Valliappa Chetiar [1971] 1 MLJ 224 (refd)
Sing Lian Express Sdn Bhd v Soh Kim Tee [1974] 2 MLJ 24 (refd)
T Damodaran v Choe Kuan Him [1979] 2 MLJ 267 (refd)
Tan Kang Hwa v Safety Insurance Co Ltd [1972] 1 MLJ 87 (refd)
Tan Kim Leng & Anor v Chong Boon Eng & Anor [1974] 2 MLJ 151 (refd)
Tan Sri Hj Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177 (refd)
Tee Chin Yong v Ernest Jeff [1963] MLJ 118 (refd)
'Vanda', The [1960] MLJ 283 (refd)
Woo Yok Lan v Loo Pek Chee [1975] 1 MLJ 156 (refd)
Youngs, Doggett, Re v Revett (1885) 30 Ch D 421 (refd)

Legislation referred to

Legal Profession (Practice and Etiquette) Rules 1978 rr 16, 18, 20, 31
National Land Code 1965 ss 245, 246, 247, 322(2), 323, 324(1), (2), 327(1), 329(1), 384
Rules of the High Court 1980 O 15 r 16, O 41 r 5
Specific Relief Act 1950 s 41

CH Ong (*Shazalyna bte Mohammad* with him) (*CK Lee & Associates*) for the plaintiff.
Badrul Hisham bin Ibrahim (*Hazman Tan*) for the defendants.

Abdul Malik Ishak J: The plaintiff successfully bidded at a public auction held at the High Court Kuala Lumpur on 23 April 2001 for a freehold extended double storey semi detached house known as number 278, 2½ Miles, Jalan Cheras, 56100 Kuala Lumpur held under Grant 27678, Lot No 126, s 91A, Town and District of Kuala Lumpur and in the Federal Territory ('the house') at the price of RM438,050. The reserved price of the said house was listed at RM328,050, and yet the plaintiff bidded at RM438,050 and had paid 10% amounting to RM43,805 to the Deputy Registrar of the High Court Kuala Lumpur. When the plaintiff successfully bidded for the said house, it was not aware that a private caveat was lodged on the title of the said house by both the defendants.

To finance the purchase of the said house, the plaintiff succeeded in obtaining a bank loan to the tune of RM340,000 from Public Bank. As security for that loan, a first party first charge of the title to the said house

was made in favour of Public Bank, and an additional guarantee was also advanced by Leong Chee Keong personally. A charge is certainly the best way to protect Public Bank. In simple language, this charge can be described as a transaction where the proprietor of an alienated land pledges that land as security for repayment of a loan. Once registered, the charge takes effect by way of security as a legal interest in the land. A first legal charge will certainly have priority over all the other later registered charges, subject, of course, to a voluntary postponement of priority as envisaged under s 247 of the National Land Code 1965 ('the NLC'). Since the charge does not involve a transfer of the statutory estate, it is thus possible to create any number of legal charges as long as there is nothing in the first or subsequent charges that will prohibit the borrower from entering into the later charges. In so far as the second or subsequent charges are concerned, they take priority in accordance with the date of their registration unless, of course, there is a change in priority by agreement or by consolidation under s 245 of the NLC, or by tacking under s 246 of the NLC or where there is a postponement under s 247 of the NLC.

Continuing with the narration of the facts, the plaintiff had on 23 May 2001 at 12.26pm made a search under s 384 of the NLC and found that both the defendants had lodged a private caveat on the land wherein the said house was located. That private caveat was lodged on 21 November 2000 at 2.47pm. Since the plaintiff had obtained a bank loan from Public Bank for the sum of RM340,000, all the plaintiff had to do was to pay the difference of RM54,245. The plaintiff was anxious to complete the sale of the said house, but the presence of the private caveat posed a barrier. So the plaintiff, being aggrieved, filed an originating summons in encl (1) seeking for the following prayers:

(1) a declaration that the plaintiff as a successful bidder in a public auction at the High Court Kuala Lumpur on 23 April 2001 had an interest on the title of the said house and be given leave to make the present application;

(2) a declaration that the private caveat entered by both the defendants on 21 November 2000 on the title of the said house did not bind the plaintiff;

(3) that the private caveat that was entered and registered on 21 November 2000 as alluded to above be removed;

(4) that the registrar of the land office at Wilayah Persekutuan be directed to remove the private caveat;

(5) that the defendants be ordered to compensate the plaintiff and such compensation be assessed by the senior assistant registrar under s 329(1) of the NLC;

(6) that the costs of this application be paid by both the defendants; and

(7) any other order or directive which the court deems fit and proper.

Enclosure (1) was dated 6 June 2001 and it was filed on the same day. It was supported by an affidavit affirmed by Leong Chee Keong on 6 June 2001, and that affidavit which was marked as encl (2) was filed on the same day. A

certificate of urgency dated 6 June 2001 and filed on the same day as seen in encl (3) was instrumental in moving this court to hear encl (1) expeditiously. A

On 21 June 2001, encl (1) came up for hearing. On that day, Ms Shazalyna bte Mohammad appeared for the plaintiff while En Badrul Hisham bin Ibrahim appeared for both the defendants. The hearing did not proceed because En Badrul Hisham bin Ibrahim requested for an adjournment, the reasons being that he was just being served with encll (1) and (2). He too requested for time to file an affidavit in reply. Miss Shazalyna bte Mohammad requested for another hearing date within a span of one to two weeks because the last date for her client — referring to the plaintiff, to pay the balance of the purchase price would be on 22 July 2001. With that state of affairs, this court fixed the hearing date for encl (1) on 5 July 2001. B C

During the hearing on 5 July 2001, Mr CH Ong appeared for the plaintiff while En Badrul Hisham bin Ibrahim appeared for both the defendants. Mr CH Ong submitted that encl (1) was supported by an affidavit in encl (2) and that there was no affidavit in reply by both the defendants. This was confirmed by En Badrul Hisham bin Ibrahim, and he then left encl (1) to the discretion of this court. Naturally, Mr CH Ong took this golden opportunity and he said, 'In view of that, pray for an order as sought for in encl (1)'. This court then gave an order in terms of encl (1). The order of this court dated 5 July 2001 has since been extracted and it can readily be seen in encl (4) thereto. It was, pure and simple, a straightforward case. Both the defendants were given time to file an affidavit in reply to encl (2) but they failed to do so. Counsel for both the defendants left the fate of encl (1) to the discretion of this court. What must this court do except to grant an order in terms of encl (1). Recently I was told by the hardworking secretary of mine by the name of Mdm Rohani Rashid that both the defendants have lodged an appeal against my decision. I swiftly called for the file and wrote this judgment. D E F

The duty of a judge

According to Raja Azlan Shah FJ (as His Majesty then was) in *Tan Kim Leng & Anor v Chong Boon Eng & Anor* [1974] 2 MLJ 151: G

> A party to a dispute is ordinarily entitled to know the grounds on which the learned judge has decided against him, and more so, when the judgment is subject to appeal. An appellate court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. H

In *Balasingham v PP* [1959] MLJ 193, Ismail Khan J (as he then was) aptly said at p 194 of the report:

> The trial court is under a statutory obligation under s 308 of the Criminal Procedure Code to transmit to the appellate court the grounds of decision which convey to my mind a reasoned judgment on the facts and the law not merely the conclusion arrived at. The advantage of a 'speaking' judgment needs no emphasis. I

In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, Gopal Sri Ram JCA held that under the English common law, a public decision maker is not obliged to give reasons for his decisions. His Lordship then proceeded to say at p 527 of the report:

> The judicial policy whereby a judge is duty bound to give reasons for his decisions was expressly declared by Azmi LP in the Rukun Keadilan, or Principles of Justice. See [1971] 2 MLJ xliii. It is only very recently that the policy has received constitutional sanction. That sanction is to be found in art 125(3A) of the Federal Constitution. The judges' Code of Ethics to which cl 3A of the Article refers was published in the Gazette on 2 December 1994. Among other matters, it proscribes a judge from 'inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgment'. And, art 125(3) (as does the code) provides, inter alia, that a judge may be removed from office 'on the ground of any breach of any provision of the code of ethics'.
>
> So it comes to this. In England, a judge who hands down a decision without providing reasons may be reversed and a retrial of the cause ordered. An identical situation in this country may result in the removal of the errant judge from office.

That briefly sums up the duty of a judge.

Who may appeal ?

A person interested, aggrieved or prejudiced by a decision may appeal, and where leave is required by statute, the person must obtain the necessary leave (*Re Applications of Chong Fye Lee & Toong Hing Loong Tin Mining Co Ltd* [1965] 31 MLJ 29 at p 31; *Tan Kang Hwa v Safety Insurance Co Ltd* [1972] 1 MLJ 87 at p 88). In other words, the proper parties must be before the court in an appeal (*Chor Phaik Har & Ors v Choong Lye Hock Estates Sdn Bhd & Ors* [1996] 2 MLJ 206; *Mohamad Salleh v Lau Siok Kee* [1974] 1 MLJ 102; *The 'Vanda'* [1960] MLJ 283; *Mohamed Ashraff & Anor v The Commissioner For Federal Capital, Kuala Lumpur & Anor* [1972] 2 MLJ 69; *Re Youngs, Doggett v Revett* (1885) 30 Ch D 421; *The Millwall* [1905] P 155; *Re Hambrougits Estate, Hambrough's v Hambrough* [1909] 2 Ch 620; and *Re B, An Infant* [1958] 1 QB 12).

Were the defendants really aggrieved by my decision that was handed down on 5 July 2001?, or were the defendants having second thoughts after they have decided not to file an affidavit in reply to encl (2) and after they have instructed their counsel to leave encl (1) to the discretion of this court? Must this court tolerate the manoeuvrings adopted by both the defendants? Certainly not. Bearing in mind the manoeuvrings of both the defendants, the appeal as lodged may be construed to be an abuse of the process of the court. It has often been said that the process of the court — which must necessarily include the appeal process, must be used properly, honestly and in good faith. The process of the court must not be abused. By way of an analogy, reference will now be made to the following cases. In *Chaffers v Goldsmid* [1894] 1 QB 186, the court held that a proceeding may be described as frivolous when a party was trifling with the court. In *Dawkins v Prince Edward of Saxe Weimar, Dawkins v Wynyard, Dawkins v Stephenson*

(1875–76) 1 QBD 499, the court held that a proceeding may be said to be frivolous when the matter was said to be wasting the time of the court. Applying these two cases, it may not be wrong to say that the appeal filed by both the defendants may be said to be an abuse of the process of the court because it was designed to waste the time of the court.

The duty of counsel to submit

Since the judge has a legal duty to write his judgment, as a corollary thereto, the learned counsel having conduct of the case must assist the judge by preparing his case and submitting on both the facts and the law. Here, unfortunately, the learned counsel for both the defendants took the easy way out by leaving the fate of encl (1) to the discretion of this court as if hoping that encl (1) would be dismissed forthwith by this court. If that was the hope of the learned counsel for both the defendants, he was certainly mistaken. At that point of time, both the facts and the law in so far as encl (1) was concerned weighed heavily in favour of the plaintiff. Having left encl (1) to the discretion of this court, learned counsel for both the defendants knew what would be the outcome of encl (1), and when the decision of encl (1) was announced, as a matter of etiquette, the matter would have ended there. But alas, an appeal has been lodged by both the defendants. It was an intolerable behaviour on the part of the learned counsel for both the defendants to leave the fate of encl (1) to the discretion of this court and then expect wonders from this court. No affidavit in reply was ever filed by both the defendants and they and their counsel must bear the consequences of their own misdoing. A trial by affidavit entails an affidavit to be filed to enable the court to adjudicate upon the matter in issue. Usually, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove (O 41 r 5 of the Rules of the High Court 1980 ('the RHC')). Both the defendants and their learned counsel must have known that encl (1) relates to the removal of a private caveat that was entered by both the defendants. Both the defendants and their learned counsel too must be taken to know and must know that the only way to challenge the application in encl (1) would be by filing an affidavit in reply. Bereft of an affidavit in reply and leaving encl (1) to the fate of this court, did not speak well for both the defendants and their counsel. Yet the law demands that the parties are entitled to know the judge's reasons for giving his decision. It is about time, that a duty be placed on counsel acting for any party to submit on the facts and the law in order to assist the court before a decision is announced. Nevertheless, there is a passage emanating from Suffian LP (as he then was) in *Ho Shee Chit & Anor v Bruusgaard Kisteruds Skibsaksjeselskap & Anor* [1982] 2 MLJ 35 which may give solace to the judges. There Suffian LP held that an appeal would not be held up even if there are no grounds of judgment.

It would be ideal, at this juncture, to reproduce in verbatim r 16 of the Legal Profession (Practice And Etiquette) Rules 1978 ('the 1978 Rules'):

> Advocate and solicitor to uphold interest of client, justice and dignity of profession

> An advocate and solicitor shall while acting with all due courtesy to the tribunal before which he is appearing, fearlessly uphold the interest of his client, the interest of justice and dignity of the profession without regard to any unpleasant consequences either to himself or to any other person.

and the learned counsel for both the defendants certainly did not live up to the standards of his profession when he simply left the fate of encl (1) to the discretion of this court. There are other provisions in the 1978 Rules which are of equal importance, and I must now reproduce them in succession:

Rule 18 of the 1978 Rules states as follows:

> Advocate and solicitor to conduct with candour, courtesy and fairness
> The conduct of an advocate and solicitor before the court and in relation to other advocates and solicitors shall be characterized by candour, courtesy and fairness.

Rule 20 of the 1978 Rules reads as follows:

> Advocate and solicitor to put before court any relevant binding decision
> (a) An advocate and solicitor shall put before the court any relevant binding decision of which he is aware which is immediately in point, whether it be for or against his contention.
> (b) This rule applies with particular importance in ex-parte proceedings.

Rule 31 of the 1978 Rules is worded in this way:

> Advocate and solicitor to uphold dignity of profession
> Every advocate and solicitor shall at all times uphold the dignity and high standing of his profession.

Now these provisions of the 1978 Rules would certainly put a heavy premium on an advocate and solicitor practising in the country. As an advocate and solicitor, any counsel that appears before the court must assist the court by being 'candour, courteous and fair'. To be candour is to be frank (see *The Concise Oxford Dictionary* (9th Ed, Thumb Index Ed) and, to do so, the learned counsel for both the defendants should not have left the fate of encl (1) to the discretion of this court. The learned counsel should have advised both the defendants to file an affidavit in reply to encl (2) and that would be in keeping with the noble ideals of the profession, and at the same time upholding the 'dignity and high standing' of the profession as envisaged under r 31 of the 1978 Rules.

I will now proceed to highlight certain aspects of encl (1), bearing in mind that I had no assistance from the learned counsel on both sides.

Private caveat

It is wrong to presume that every person has a right to enter a private caveat. Section 323 of the NLC envisages the situation that only a person having a caveatable interest may enter a private caveat. It is essential that a person who enters a private caveat must claim title to the land or any registrable interest in the land or any right to such title or interest to the land. Under s 324(1) of the NLC, it is not the duty nor the function of the registrar to enquire into whether the application for the entry of a private caveat is

validly made. It is the domain of the High Court to exercise its judicial function to adjudicate on the validity of the entry of the private caveat. According to the long line of authorities, the registrar's duty in respect of an application for entry of a private caveat is purely administrative or ministerial (*N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161; *Tee Chin Yong v Ernest Jeff* [1963] MLJ 118 at p 119; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 at p 230; and *T Damodaran v Choe Kuan Him* [1979] 2 MLJ 267 at p 270). In my view, an application for the entry of a private caveat shall be in compliance with Form 19B, and that form shall be duly signed, attested, verified by the statutory declaration of the applicant or his advocate and solicitor, and the form too must be accompanied by the appropriate fee which has to be paid. Upon sight of Form 19B as stated, the registrar has no discretion but must enter the private caveat that was applied for.

It is unfortunate that counsel for both sides did not submit in regard to the application in encl (1), otherwise this judgment would be more interesting. Be that as it may, it is a correct statement of the law to say, and I so say, that the following persons have been held by the courts to have caveatable interests in land:

(1) a bona fide purchaser having a valid sale and purchase agreement (*Macon Engineers Sdn Bhd v Goh Hooi Yin* [1976] 2 MLJ 53);

(2) an option holder as envisaged in *Sing Lian Express Sdn Bhd v Soh Kim Tee* [1974] 2 MLJ 24;

(3) a chargee (*K Sockalingam Mudaliar v MRM Ramasamy Chettiar; A Veeramal* [1938] MLJ 237);

(4) a lessee as exemplified in *Margaret Chua v Ho Swee Kiew & Ors* [1961] MLJ 173;

(5) a sub-lessee as seen in *Inter-Continental Mining Co Sdn Bhd v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145;

(6) a beneficiary who succeeded in obtaining the letters of administration (*Jit Kaur v Parl Singh* [1974] 2 MLJ 199) and sought to challenge the validity of a transfer; and, last but by no means least;

(7) a beneficiary of a wakaf land as envisaged in *Haji Yahya bin Yusoff & Anor v Hassan bin Othman & Anor* [1978] 2 MLJ 153.

Under s 324(2) of the NLC, the entry of a private caveat takes effect from the time of receipt of the application by the registrar endorsing on the register document of title under his hand and seal, the words 'Private Caveat' accompanied by a statement specifying:

(a) whether the private caveat binds the land itself, or a particular interest therein only;

(b) the person or body on whose application it was entered;

(c) the time from which it is effective (being the time of receipt of the application, as noted thereon pursuant to sub-s (1)); and

(d) the reference under which the application is filed.

The effect of a private caveat

Section 322(2) of the NLC enacts that a private caveat prohibits registration, endorsement or entry of:

(a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

Removal of a private caveat

The NLC prescribes two ways of removing a private caveat. One way would be by the registrar, and the other way would be by the High Court. In this judgment, I am concerned only with the second method.

Under s 327 of the NLC, any aggrieved person may apply to the High Court for an order to remove the private caveat. The term 'aggrieved person' covers a wide scope and it is wide enough to cover and encompass any person whose interest in the land is adversely affected by the existence of the private caveat. The plaintiff was certainly an 'aggrieved body' and its interests to the title of the said house made it a fit candidate to apply to this court to remove the private caveat that was filed by both the defendants. As a successful bidder at a public auction, the plaintiff must be described as 'aggrieved' at the entry of the private caveat by both the defendants. Although s 327(1) of the NLC gives the power to this court to remove a private caveat on an ex parte basis, yet encl (1) that was supported by encl (2) were heard inter partes. It is appropriate to say that an application for removal of a private caveat may be made by summons in chambers in a pending suit (*Woo Yok Wan v Loo Pek Chee* [1975] 1 MLJ 156); it may even be made by way of an originating summons as exemplified in the case of *Chi Liung & Son Sdn Bhd v Chong Fah & Sons Sdn Bhd & Anor* [1974] 2 MLJ 211; it may also be made by originating motion as envisaged in *Chiew Sze Sun v Muthiah Chettiar* [1983] 1 MLJ 390. In the present case, the plaintiff filed an originating summons in encl (1) to remove the private caveat, and the procedure adopted by the plaintiff was beyond reproach. On 5 July 2001, when this court ordered the private caveat to be removed, both the defendants as the caveators appeared to be satisfied with the decision of this court because there was no application for an oral stay. If there was an oral application for a stay, this court was empowered and had the discretion whether to grant or refuse a stay. As it turned out, both the defendants left encl (1) to the discretion of this court, and by conduct, both of the defendants were not concerned as to whether the private caveat should remain or otherwise on the register document of title. Lord Coke defined estoppel in this way (Co Litt 352a, quotation obtained from David Jackson, 'Estoppel as a Sword — Part 1' (1965) 81 LQR 84 at p 85):

> Estoppe, cometh of the French word estoupe, from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.

which when applied to both the defendants, would estop them from challenging the decision of this court. To confound the matter further, as I said, there was no affidavit in reply to encl (2). A

Declaration

A declaration declares the legal rights of the parties. A declaratory order has no coercive force and it is a private law remedy available to any citizen. A declaration is useful because the public authority on whom that declaration is directed at will not disobey the declaration made by the court. According to Raja Azlan Shah Acting LP (as His Majesty then was) in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 at p 31, that a declaration is a wide ranging and flexible remedy and it can be used in a 'wide range of circumstances' and a 'wide variety of cases in terms of subject-matter'. B C

Section 41 of the Specific Relief Act 1950 ('the Act') makes provisions for a declaratory decree. It enacts that any person entitled to any 'legal character', or to any 'right as to any property', may institute a suit against any person denying, or interested to deny, his title to the 'character' or 'right'. The court may in its judicial discretion make a declaration that the person is so entitled. D

Order 15 r 16 of the RHC gives broader power to the court to issue a declaration and it is worded as follows: E

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

In my considered view, s 41 of the Act gives the plaintiff the right to seek a declaration as regards the plaintiff's entitlement to a legal character, or status or right to property. Whereas under O 15 r 16 of the RHC, all the plaintiff needs to do would be to show that his legal interests are peculiarly affected (*Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177; and *Lim Cho Hock v Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85 at p 87). In *Hanson v Radcliffe Urban District Council* [1922] 2 Ch 490, Lord Sterndale MR succinctly said at p 507 of the report: F G

> In my opinion, under O XXV r 5, the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should of course be exercised judicially, but it seems to me that the discretion is very wide. H

Viscount Radcliffe echoed the same sentiments in the case of the Privy Council in *Ikebife Ibeneweka & Ors v Peter Egbuna & Anor* [1964] 1 WLR 219, when his Lordship said at pp 224–225 of the report:

> Much has been said in various reported judgments about the nature of the power thus vested in the court, but none of these observations detracts from the two primary considerations, that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is I

A conferred is a discretion to be exercised according to the facts of each individual case.

The general theme of judicial observations has been to the effect that declarations are not lightly granted. The power should be exercised 'sparingly' with 'great care and jealousy', with 'extreme caution' and with
B 'the utmost caution'. These are indeed counsels of moderation, even though as, Lord Dunedin once observed, such expressions afford little guidance for particular cases. Nevertheless, anxious warnings of this character appear to their Lordships to be not so much enunciations of legal principles as administrative cautions issued by eminent and prudent judges to their, possibly more reckless, successors. After all, it is doubtful if there
C is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realization that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that, there is no legal restriction on the award of a declaration.

D The essence of a declaration is that it states the rights or legal position of the parties as they stand. It is entirely discretionary on the part of the court whether to allow the declaration that is being sought. Being a discretionary remedy, the court has the inherent power to refuse relief to speculators and busybodies and to those who ask hypothetical questions (*Re Barnato, Decd, Joel v Sanges* [1949] Ch 258; and *Harrison v Croydon London*
E *Borough Council* [1968] Ch 479). The court too will refuse declarations to those who have no sufficient interest. The question for determination by the court must be a real and not theoretical question. The person who seeks a declaration must have a real interest to raise it. The plaintiff here fits the bill perfectly. It was entitled to seek the declarations which it sought for, and I so ordered accordingly.

F

Conclusion

For all these reasons, I allowed the prayers sought for in encl (1) by granting an order in terms thereto.

G *Order accordingly.*

Reported by Lim Lee Na

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